

Court of Appeals No. 48074-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

respondent,

v.

MOUNTAIN VIEW PLACE, LLC,

appellant,

and

**RELIASTAR LIFE INSURANCE COMPANY; and
CLARK COUNTY, WASHINGTON,**

defendants.

REPLY BRIEF OF APPELLANT

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CORRECTION OF FACTUAL MISSTATEMENTS

WSDOT claims that commercial development “*might* require a different type of access.” *Brief of Respondent* at 2. Contrary to the foregoing implication, a different type of access is mandated for *any* development under the limitation imposed by WSDOT: [i]f the property use changes, the approach will not be perpetuated without the State’s prior written approval . . .,” *CP 130*; and governing regulations, WAC 468-58-080(3)(b).

WSDOT quotes the definition of “modified controlled limited access highway” as allowing “most approaches, including commercial approaches, existing at the time of establishment.” *Brief of Respondent* at 5, quoting WAC 468-58-010(3). This definition does not supersede “definitive standards” in WAC 468-58-100(1)(a). Moreover, Mountain View’s approach is pre-existing; the only issues are the type and use limitation.

WSDOT discusses prior “negotiations between the parties, but no agreement,” *Brief of Respondent* at 5-6; implying that Mountain View may share in fault for the arbitrarily limited approach determined by WSDOT. Throughout the negotiations, Mountain View maintained the position that no limitation could be accepted which would frustrate future development and use of its five assembled parcels.

ARGUMENT

Contrary to WSDOT's arguments, neither the term "deference," nor any derivation thereof, appear in Chapter 47.12 nor 47.52 RCW. *Brief of Respondent* at 1, 9. While courts may have afforded deference to certain agency determinations under those statutes, they were not acting upon a legislative mandate. In any event, no deference is due agency determinations in violation of governing regulations. Agency action "without lawful authority" is willful and unreasoning; hence, arbitrary and capricious. *Mission Springs v. Spokane*, 134 Wash.2d 947, 962, 954 P.2d 250 (1998). Accord *Freeman v. State*, 178 Wash.2d 387, 404, 309 P.3d 437 (2013) ("we . . . review WSDOT's determination under the arbitrary and capricious or *contrary to law* standard," emphasis added).

WSDOT cites *Des Moines v. Hemenway* in support of its conclusion that "more than a difference of opinion is required to find arbitrary and capricious conduct." *Brief of Respondent* at 10-11; citing *Des Moines v. Hemenway*, 73 Wash. 2d 130, 140, 437 P.2d 171 (1968). While the Court does not use quite those words, we agree with the conclusion. The "more" that is required is provided by WSDOT's violation of "definitive standards" under WAC 468-58-100(1)(a).

WSDOT cites *Bellevue v. Pine Forest Properties* for its decision not to disturb a finding of necessity “so long as it was reached ‘honestly, fairly, and upon due consideration’ of the facts and circumstances.” *Brief of Respondent* at 11; citing *Bellevue v. Pine Forest Properties*, 185 Wash.App. 244, 263, 340 P.3d 938 (2014), *review denied*, 183 Wash.2d 1016, 355 P.3d 1152 (2015). However, a decision in violation of governing regulations is neither honest, fair, nor made upon due consideration of the facts and circumstances. As noted above, the Washington Supreme Court has equated “without lawful authority” with “arbitrary and capricious,” defined as willful unreasoning action in disregard of facts and circumstances. *Mission Springs*, 134 Wash.2d at 962. Accord *Freeman*, 178 Wash.2d at 404.

WSDOT argues that “right-of-way plans were not implemented on a whim; they were the result of a deliberative and public process with notice to abutting landowners and opportunity for comment.” *Brief of Respondent* at 12. Notification and public participation do not save WSDOT from failing to comply with mandatory regulations. If there was a deliberative agency process, either it yielded no analysis nor evidence to support a Type C limited approach under “definitive standards” in WAC 468-58-100(1)(a), or WSDOT has failed to make a record thereof.

WSDOT argues its “acquisition of . . . limited access rights . . . is consistent with its right-of-way plans that were developed and implemented in support of the Project and were part of the record below.” *Brief of Respondent* at 12, citing *CP 38*. The Limited Access Findings and Order do not specify the *type* of limited access approach determined for Mountain View’s property, and include no findings regarding that issue. *CP 86-95*. Lest it be argued that the approach type was incorporated by reference, no exhibits are attached to the order, and no such exhibits are before this Court. *Id.* The Court does not consider arguments based on materials outside the record. *Doe v. Puget Sound Blood Center*, 117 Wash.2d 772, 786, 819 P.2d 370 (1991); *State v. King*, 24 Wash.App. 495, 498, 601 P.2d 982 (1979). The Courts of Appeals reviewing a condemnation petition will not grant a motion to supplement the record where the additional evidence consists of documents that “were available and readily discoverable” prior to trial. *Schreiner v. Spokane*, 74 Wash.App. 617, 621, 874 P.2d 883 (1994). Moreover, the Right of Way and Limited Access Plan attached as Exhibit A to the *Brief of Respondent* is dated August 1, 2013. *CP 38*. The Limited Access Findings and Order is dated July 30, 2012. *CP 95*. Hence, the plan did not yet exist during the hearing or when the order was adopted.

Contrary to WSDOT's argument, Mountain View does not *ignore* the fact that access is being acquired for a highway, *Brief of Respondent* at 13; rather, Mountain View argues that definitive standards in WAC 468-58-100(1) govern highway condemnations. As recounted in *Sound Transit v. Miller*, "challenges to necessity are raised when arguably excess land is seized." *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wash.2d 403, 411, 128 P.3d 588 (2006); citing *Washington State Convention & Trade Center v. Evans*, 136 Wash.2d 811, 966 P.2d 1252 (1998). Of course, "[t]he owner of land abutting an existing public way has a property right of ingress and egress, and is entitled to just compensation if this right is taken or damaged." *Central Puget Sound Regional Transit Authority v. Eastey*, 135 Wash.App. 446, 461, 144 P.3d 322 (2006); citing *State v. Calkins*, 50 Wash.2d 716, 718, 314 P.2d 449 (1957). If *excess* access is taken, the issue raised is whether the take is necessary? In the present case, the take is not necessary because WSDOT failed to carry its burden of compliance with "definitive standards" under WAC 468-58-100(1)(a).

WSDOT argues "[t]he record below establishes that the subject property does not currently have a separated on and off approach, and for that reason alone a Type E approach is not appropriate." *Brief of Respondent*

at 14. Contrary to WSDOT's argument, neither statute nor regulation limit approaches to uses currently existing. Rather, governing regulations require road approaches to be "commensurate with the present *and potential* land use" based upon the "[h]ighest use and best use of adjoining lands," consistent with "[c]hange[s] in use by merger of adjoining ownerships." WAC 468-58-100(1)(a), emphasis added. Hence, WSDOT is incorrect in its conclusion that "granting a Type E approach . . . would violate WAC 468-58-100(1)." *Brief of Respondent* at 14.

WSDOT argues that Mountain View "offered no proof that it had development plans pending that would qualify them to take advantage of the City of Vancouver's "MX" designation for commercial uses on any of the five properties." *Brief of Respondent* at 15. However, criteria for determining approach types do not include "pending development plans;" rather, they include "[l]ocal comprehensive plans, zoning and land use ordinances, . . . county ordinances, . . . [t]he highest and best use of the property . . . and . . . adjoining lands." WAC 468-58-100(1)(a). Vested interest in a land use application is notably absent from the criteria.

According to WSDOT, Mountain View's "argument that its expectations should be considered a potential use would eliminate

deferential rationality review, and require WSDOT to speculate about any conceivable change in land use designation or re-zoning of the subject property.” *Brief of Respondent* at 15-16. “Deferential rationality” is the review standard for equal protection and due process cases *not* involving suspect classifications, not the standard for agency determination of approach classifications. *Brown v. Department of Commerce*, 184 Wash.2d 509, 545, 359 P.3d 771 (2015). Moreover, “definitive standards for road approaches on modified access controlled highways” do not invite WSDOT to provide comment upon pending applications, which would constitute a nonsequitur because land use applications are not contemplated by condemnation regulations. Finally, WSDOT would not be called upon to speculate upon “any conceivable change in land use designation” because approaches are divided into basic land use types:

(i) Type A approach. Type A approach is an off and on approach in legal manner, not to exceed thirty feet in width, for sole purpose of serving a **single family residence**. . . .

(ii) Type B approach. Type B approach is an off and on approach in legal manner, not to exceed fifty feet in width, for use necessary to the normal operation of a **farm**, but not for retail marketing. . . .

(iii) Type C approach. Type C approach is an off and on approach in legal manner, for **special purpose** and width to be agreed upon. . . .

(iv) Type D approach is an off and on approach in a legal manner not to exceed **fifty feet in width** for use necessary to the normal operation of a **commercial establishment**. . . .

(v) Type E approach is a **separated** off and on approach in a legal manner, with **each opening not exceeding thirty feet in width**, for use necessary to the normal operations of a **commercial establishment**. . . .

WAC 468-58-080(3)(b), emphasis added. It is noteworthy that the only residential designation available is “a single-family residence;” hence, WSDOT was left to choose between a special purpose approach and a commercial approach. No conflict occurred until WSDOT added a condition that limits the scope of use to “a multi-family apartment complex . . . [i]f the property use changes, the approach will not be perpetuated without the State’s prior written approval . . .” *CP 130*. This condition exceeds delegated authority because it creates veto power over future land use applications where WSDOT has only authority to comment. RCW 36.70B.110. The authority of state agencies “includes powers that are expressly delegated by statute and those necessarily implied from statutory grants of authority.” *Armstrong v. State*, 91 Wash.App. 530, 538, 958 P.2d 1010 (1998). Veto power over any change in use is neither expressly delegated nor necessarily implied under the governing statute.

WSDOT claims there is no evidence “that WSDOT had any knowledge that Mountain View intended to put the subject property to commercial use in the future.” *Brief of Respondent* at 15. This contention implies that arbitrary and capricious action is limited to knowledge or intent, rather than violation of definitive standards for road approaches under WAC 468-58-100(1). Agency violation of governing regulations is arbitrary and capricious. *Mission Springs*, 134 Wash.2d at 962.

According to WSDOT, Mountain View “argues that the term ‘appraisal’ should be used in the legal context of formal determination of a property’s market value.” *Brief of Respondent* at 16. To the contrary, Mountain View argues “that the rulemakers intended approach types to be determined by experts rather than WSDOT staff.” *Brief of Appellant* at 12. Nothing in Mountain View’s argument implies that the appraisal of approach types is *limited* to a financial valuation: “Moreover, the focus upon ‘presentation and analysis of relevant market information’ implies that the rulemakers intended an analytical report supported by evidence.” *Id.* WSDOT, however, offers only unsupported allegations, not analysis nor evidence to support its determination under the “definitive standards” of WAC 468-58-100(1)(a).

According to WSDOT:

[Mountain View] attempts to argue that its substantive due process rights are implicated by WSDOT's conduct in this matter while conceding this is a condemnation case and that the state does not dispute [Mountain View's] right to just compensation for the taking. . . . Both cannot be true.

Brief of Respondent at 18. WSDOT's argument is a textbook example of the fallacy of undistributed middle term. Substantive due process is deprived *per se* by "arbitrary or capricious" state action. *Lutheran Day Care v. Snohomish County*, 119 Wash. 2d 91, 125, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993). WSDOT's violation of "definitive standards" under WAC 468-58-100(1)(a) was arbitrary and capricious, as discussed above; hence, imposition of a limited Type C approach deprived Mountain View of substantive due process.

* * *

CONCLUSION

By incorrectly, albeit strategically, restating the issue, WSDOT has failed to address Mountain View's arguments. Obviously, acquisition of access rights may be necessary to support a public use; however, the determination *and limitation* of approach types raises issues of compliance with definitive standards under governing regulations.

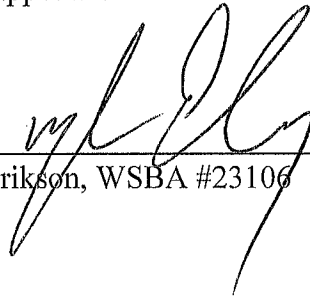
The trial court's *Order Adjudicating Public Use and Necessity* is not supported by substantial evidence because the determination of a Type C approach serving only existing uses on one of Mountain View's lots is unlawful, arbitrary and capricious, in violation of "definitive standards" under WAC 468-58-100(1)(a). The order should be revised to grant a Type E approach serving Mountain View's assemblage of five lots without the limitation requiring WSDOT approval for any change of use.

RESPECTFULLY SUBMITTED this 10th day of February, 2016.

ERIKSON & ASSOCIATES, PLLC
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By: _____

Mark A. Erikson, WSBA #23106

A handwritten signature in black ink, appearing to read 'Mark A. Erikson', is written over a horizontal line.

CERTIFICATE OF SERVICE

#48074-3-II

I certify that on the 10th day of February 2016, I caused a true and correct copy of this *Brief of Appellants* to be served on the following in the manner indicated below:

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RCW 36.70B.110

Notice of application—Required elements—Integration with other review procedures—Administrative appeals (as amended by 1997 c 396).

(1) Not later than April 1, 1996, a local government planning under RCW **36.70A.040** shall provide a notice of application to the public and the departments and agencies with jurisdiction as provided in this section. If a local government has made a threshold determination (~~((of significance))~~) under chapter **43.21C** RCW concurrently with the notice of application, the notice of application (~~((shall))~~) may be combined with the threshold determination (~~((of significance))~~) and the scoping notice for a determination of significance. Nothing in this section prevents a determination of significance and scoping notice from being issued prior to the notice of application.

(2) The notice of application shall be provided within fourteen days after the determination of completeness as provided in RCW **36.70B.070** and include the following in whatever sequence or format the local government deems appropriate:

(a) The date of application, the date of the notice of completion for the application, and the date of the notice of application;

(b) A description of the proposed project action and a list of the project permits included in the application and, if applicable, a list of any studies requested under RCW **36.70B.070** or **36.70B.090**;

(c) The identification of other permits not included in the application to the extent known by the local government;

(d) The identification of existing environmental documents that evaluate the proposed project, and, if not otherwise stated on the document providing the notice of application, such as a city land use bulletin, the location where the application and any studies can be reviewed;

(e) A statement of the public comment period, which shall be not less than fourteen nor more than thirty days following the date of notice of application, and statements of the right of any person to comment on the application, receive notice of and participate in any hearings, request a copy of the decision once made, and any appeal rights. A local government may accept public comments at any time prior to the closing of the record of an open record predecision hearing, if any, or, if no open record predecision hearing is provided, prior to the decision on the project permit;

(f) The date, time, place, and type of hearing, if applicable and scheduled at the date of notice of the application;

(g) A statement of the preliminary determination, if one has been made at the time of notice, of those development regulations that will be used for project mitigation and of consistency as provided in RCW **36.70B.040**; and

(h) Any other information determined appropriate by the local government.

(3) If an open record predecision hearing is required for the requested project permits, the notice of application shall be provided at least fifteen days prior to the open record hearing.

(4) A local government shall use reasonable methods to give the notice of application to the public and agencies with jurisdiction and may use its existing notice procedures. A local government may use different types of notice for different categories of project permits or types of project actions. If a local government by resolution or ordinance does not specify its method of public notice, the local government shall use the methods provided for in (a) and (b) of this subsection. Examples of reasonable methods to inform the public are:

(a) Posting the property for site-specific proposals;

(b) Publishing notice, including at least the project location, description, type of permit(s)

required, comment period dates, and location where the complete application may be reviewed, in the newspaper of general circulation in the general area where the proposal is located or in a local land use newsletter published by the local government;

(c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;

(d) Notifying the news media;

(e) Placing notices in appropriate regional or neighborhood newspapers or trade journals;

(f) Publishing notice in agency newsletters or sending notice to agency mailing lists, either general lists or lists for specific proposals or subject areas; and

(g) Mailing to neighboring property owners.

(5) A notice of application shall not be required for project permits that are categorically exempt under chapter **43.21C** RCW, unless a public comment period or an open record predecision hearing is required.

(6) A local government shall integrate the permit procedures in this section with environmental review under chapter **43.21C** RCW as follows:

(a) Except for a threshold determination (~~((of significance))~~), the local government may not issue (~~((its threshold determination, or issue))~~) a decision or a recommendation on a project permit until the expiration of the public comment period on the notice of application.

(b) If an open record predecision hearing is required and the local government's threshold determination requires public notice under chapter **43.21C** RCW, the local government shall issue its threshold determination at least fifteen days prior to the open record predecision hearing.

(c) Comments shall be as specific as possible.

(7) A local government may combine any hearing on a project permit with any hearing that may be held by another local, state, regional, federal, or other agency provided that the hearing is held within the geographic boundary of the local government. Hearings shall be combined if requested by an applicant, as long as the joint hearing can be held within the time periods specified in ***RCW 36.70B.090** or the applicant agrees to the schedule in the event that additional time is needed in order to combine the hearings. All agencies of the state of Washington, including municipal corporations and counties participating in a combined hearing, are hereby authorized to issue joint hearing notices and develop a joint format, select a mutually acceptable hearing body or officer, and take such other actions as may be necessary to hold joint hearings consistent with each of their respective statutory obligations.

(8) All state and local agencies shall cooperate to the fullest extent possible with the local government in holding a joint hearing if requested to do so, as long as:

(a) The agency is not expressly prohibited by statute from doing so;

(b) Sufficient notice of the hearing is given to meet each of the agencies' adopted notice requirements as set forth in statute, ordinance, or rule; and

(c) The agency has received the necessary information about the proposed project from the applicant to hold its hearing at the same time as the local government hearing.

(9) A local government is not required to provide for administrative appeals. If provided, an administrative appeal of the project decision, combined with any environmental determinations, shall be filed within fourteen days after the notice of the decision or after other notice that the decision has been made and is appealable. The local government shall extend the appeal period for an additional seven days, if state or local rules adopted pursuant to chapter **43.21C** RCW allow public comment on a determination of nonsignificance issued as part of the appealable project permit decision.

(10) The applicant for a project permit is deemed to be a participant in any comment period,

open record hearing, or closed record appeal.

(11) Each local government planning under RCW **36.70A.040** shall adopt procedures for administrative interpretation of its development regulations.

[1997 c 396 § 1; 1995 c 347 § 415.]

NOTES:

***Reviser's note:** RCW **36.70B.090** expired June 30, 2000, pursuant to 1998 c 286 § 8.

RCW 36.70B.110

Notice of application—Required elements—Integration with other review procedures—Administrative appeals (as amended by 1997 c 429).

(1) Not later than April 1, 1996, a local government planning under RCW **36.70A.040** shall provide a notice of application to the public and the departments and agencies with jurisdiction as provided in this section. If a local government has made a determination of significance under chapter **43.21C** RCW concurrently with the notice of application, the notice of application shall be combined with the determination of significance and scoping notice. Nothing in this section prevents a determination of significance and scoping notice from being issued prior to the notice of application. Nothing in this section or this chapter prevents a lead agency, when it is a project proponent or is funding a project, from conducting its review under chapter **43.21C** RCW or from allowing appeals of procedural determinations prior to submitting a project permit application.

(2) The notice of application shall be provided within fourteen days after the determination of completeness as provided in RCW **36.70B.070** and, except as limited by the provisions of subsection (4)(b) of this section, shall include the following in whatever sequence or format the local government deems appropriate:

(a) The date of application, the date of the notice of completion for the application, and the date of the notice of application;

(b) A description of the proposed project action and a list of the project permits included in the application and, if applicable, a list of any studies requested under RCW **36.70B.070** or **36.70B.090**;

(c) The identification of other permits not included in the application to the extent known by the local government;

(d) The identification of existing environmental documents that evaluate the proposed project, and, if not otherwise stated on the document providing the notice of application, such as a city land use bulletin, the location where the application and any studies can be reviewed;

(e) A statement of the public comment period, which shall be not less than fourteen nor more than thirty days following the date of notice of application, and statements of the right of any person to comment on the application, receive notice of and participate in any hearings, request a copy of the decision once made, and any appeal rights. A local government may accept public comments at any time prior to the closing of the record of an open record predecision hearing, if any, or, if no open record predecision hearing is provided, prior to the decision on the project permit;

(f) The date, time, place, and type of hearing, if applicable and scheduled at the date of notice of the application;

(g) A statement of the preliminary determination, if one has been made at the time of notice, of those development regulations that will be used for project mitigation and of consistency as

provided in RCW (~~(36.70B.040)~~) 36.70B.030(2); and

(h) Any other information determined appropriate by the local government.

(3) If an open record predecision hearing is required for the requested project permits, the notice of application shall be provided at least fifteen days prior to the open record hearing.

(4) A local government shall use reasonable methods to give the notice of application to the public and agencies with jurisdiction and may use its existing notice procedures. A local government may use different types of notice for different categories of project permits or types of project actions. If a local government by resolution or ordinance does not specify its method of public notice, the local government shall use the methods provided for in (a) and (b) of this subsection. Examples of reasonable methods to inform the public are:

(a) Posting the property for site-specific proposals;

(b) Publishing notice, including at least the project location, description, type of permit(s) required, comment period dates, and location where the notice of application required by subsection (2) of this section and the complete application may be reviewed, in the newspaper of general circulation in the general area where the proposal is located or in a local land use newsletter published by the local government;

(c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;

(d) Notifying the news media;

(e) Placing notices in appropriate regional or neighborhood newspapers or trade journals;

(f) Publishing notice in agency newsletters or sending notice to agency mailing lists, either general lists or lists for specific proposals or subject areas; and

(g) Mailing to neighboring property owners.

(5) A notice of application shall not be required for project permits that are categorically exempt under chapter **43.21C** RCW, unless (~~a public comment period or~~) an open record predecision hearing is required or an open record appeal hearing is allowed on the project permit decision.

(6) A local government shall integrate the permit procedures in this section with its environmental review under chapter **43.21C** RCW as follows:

(a) Except for a determination of significance and except as otherwise expressly allowed in this section, the local government may not issue its threshold determination(~~(, or issue a decision or a recommendation on a project permit)~~) until the expiration of the public comment period on the notice of application.

(b) If an open record predecision hearing is required (~~(and the local government's threshold determination requires public notice under chapter 43.21C RCW)~~), the local government shall issue its threshold determination at least fifteen days prior to the open record predecision hearing.

(c) Comments shall be as specific as possible.

(d) A local government is not required to provide for administrative appeals of its threshold determination. If provided, an administrative appeal shall be filed within fourteen days after notice that the determination has been made and is appealable. Except as otherwise expressly provided in this section, the appeal hearing on a determination of nonsignificance shall be consolidated with any open record hearing on the project permit.

(7) At the request of the applicant, a local government may combine any hearing on a project permit with any hearing that may be held by another local, state, regional, federal, or other agency ((provided that)), if:

(a) The hearing is held within the geographic boundary of the local government((~~Hearings shall be combined if requested by an applicant, as long as~~)); and

(b) The joint hearing can be held within the time periods specified in ***RCW 36.70B.090** or the applicant agrees to the schedule in the event that additional time is needed in order to combine the hearings. All agencies of the state of Washington, including municipal corporations and counties participating in a combined hearing, are hereby authorized to issue joint hearing notices and develop a joint format, select a mutually acceptable hearing body or officer, and take such other actions as may be necessary to hold joint hearings consistent with each of their respective statutory obligations.

(8) All state and local agencies shall cooperate to the fullest extent possible with the local government in holding a joint hearing if requested to do so, as long as:

(a) The agency is not expressly prohibited by statute from doing so;

(b) Sufficient notice of the hearing is given to meet each of the agencies' adopted notice requirements as set forth in statute, ordinance, or rule; and

(c) The agency has received the necessary information about the proposed project from the applicant to hold its hearing at the same time as the local government hearing.

(9) A local government is not required to provide for administrative appeals. If provided, an administrative appeal of the project decision(~~((, combined with))~~) and of any environmental determination((s)) issued at the same time as the project decision, shall be filed within fourteen days after the notice of the decision or after other notice that the decision has been made and is appealable. The local government shall extend the appeal period for an additional seven days, if state or local rules adopted pursuant to chapter **43.21C** RCW allow public comment on a determination of nonsignificance issued as part of the appealable project permit decision.

(10) The applicant for a project permit is deemed to be a participant in any comment period, open record hearing, or closed record appeal.

(11) Each local government planning under RCW **36.70A.040** shall adopt procedures for administrative interpretation of its development regulations.

[1997 c 429 § 48; 1995 c 347 § 415.]

NOTES:

Reviser's note: *(1) RCW **36.70B.090** expired June 30, 2000, pursuant to 1998 c 286 § 8.

(2) RCW **36.70B.110** was amended twice during the 1997 legislative session, each without reference to the other. For rule of construction concerning sections amended more than once during the same legislative session, see RCW **1.12.025**.

Severability—1997 c 429: See note following RCW **36.70A.3201**.

WAC 468-58-080**Guides for control of access on crossroads and interchange ramps.**

(1) Fully controlled highways, including interstate.

(a) There shall be no connections to abutting property or local service or frontage roads within the full length of any "off" or "on" interchange ramp from a fully controlled limited access highway. Such ramp shall be considered to terminate at its intersection with the local road which undercrosses or overcrosses the limited access facility, provided that in urban areas "off" and "on" ramps may be terminated at local streets other than crossroads where necessary to service existing local traffic.

(b) There shall be no direct connections from the limited access facility in rural areas to local service or frontage roads except through interchanges.

(c) In both urban and rural areas access control on a fully controlled highway shall be established along the crossroad at an interchange for a minimum distance of three hundred feet beyond the centerline of the ramp or terminus of transition taper. If a frontage road or local road is located in a generally parallel position within three hundred fifty feet of a ramp, access control should be established along the crossroad and in addition for a minimum distance of one hundred thirty feet in all directions from the center of the intersection of the parallel road and crossroad.

(d) Full control of access should be provided along the crossroad from the centerline of a ramp or terminus of a transition taper for a minimum distance of three hundred feet. Upon determination by the department, full control of access may be provided for the first one hundred thirty feet from the centerline of the ramp or terminus of a transition taper and partial control or modified control of access may be provided for the remainder of the distance to the frontage road or local road for a total minimum distance for the two types of control of three hundred feet. Type A, B, C, D, E, and F road approaches, as defined hereafter under subsection (3) of this section, "general," may be permitted on that portion of the crossroad on which partial or modified control of access is established.

(2) Partially controlled highways.

(a) There shall be no connections to abutting property or local service or frontage roads within the full length of any "off" or "on" interchange ramp from a partially controlled limited access highway. Such ramp shall be considered to terminate at its intersection with the local road which undercrosses or overcrosses the limited access facility, provided that in urban areas "off" and "on" ramps may be terminated at local streets other than crossroads where necessary to service existing local traffic.

(b) In both urban and rural areas access control on a partially controlled highway shall be established along the crossroad at an interchange for a minimum distance of three hundred feet beyond the centerline of the ramp or terminus of transition taper. If a frontage road or local road is located in a generally parallel position within three hundred fifty feet of a ramp, access control should be established along the crossroad and in addition for a minimum distance of one hundred thirty feet in all directions from the center of the intersection of the parallel road and crossroad.

(c) Access control limits at the crossroads on a partially controlled highway should be established along the crossroad at a grade intersection for a minimum distance of three hundred feet from the centerline of the nearest directional roadway. If a parallel road is located within three hundred fifty feet of said grade intersection, access control should be established along the crossroad and in addition for a minimum distance of one hundred thirty feet in all directions from the center of the intersection of the parallel road and crossroad. Type D, E, and F approaches may be permitted closer than one hundred thirty feet from the center of the intersection only when

they already exist and cannot reasonably be relocated.

(d) Access control limits at intersections on modified control highways should be established along the cross road for a minimum distance of one hundred thirty feet from the centerline of a two-lane highway or for a minimum of one hundred thirty feet from centerline of the nearest directional roadway of a four-lane highway. Type D, E, and F approaches should be allowed within this area only when no other reasonable alternative is available.

(3) General.

(a) Access control may be increased or decreased beyond or under the minimum requirements to fit local conditions if so determined by the department.

(b) Type A, B, C, D, E, and F approaches are defined as follows:

(i) Type A approach. Type A approach is an off and on approach in legal manner, not to exceed thirty feet in width, for sole purpose of serving a single family residence. It may be reserved by abutting owner for specified use at a point satisfactory to the state at or between designated highway stations.

(ii) Type B approach. Type B approach is an off and on approach in legal manner, not to exceed fifty feet in width, for use necessary to the normal operation of a farm, but not for retail marketing. It may be reserved by abutting owner for specified use at a point satisfactory to the state at or between designated highway stations.

(iii) Type C approach. Type C approach is an off and on approach in legal manner, for special purpose and width to be agreed upon. It may be specified at a point satisfactory to the state at or between designated highway stations.

(iv) Type D approach is an off and on approach in a legal manner not to exceed fifty feet in width for use necessary to the normal operation of a commercial establishment. It may be specified at a point satisfactory to the state at or between designated highway stations.

(v) Type E approach is a separated off and on approach in a legal manner, with each opening not exceeding thirty feet in width, for use necessary to the normal operations of a commercial establishment. It may be specified at a point satisfactory to the state at or between designated highway stations.

(vi) Type F approach is an off and on approach in a legal manner, not to exceed thirty feet in width, for the sole purpose of serving a wireless communication site. It may be specified at a point satisfactory to the state at or between designated highway stations.

The state shall only authorize such approach by the issuance of a nonassignable permit. The permit allows site access for the normal construction, operation and maintenance of the wireless communication site for the permit holder and its contractors but not its subtenants. If a sale or merger occurs that affects an existing wireless communication site, the new wireless communication provider will be authorized to utilize said approach upon the state's receipt of written notice of the sale or merger action. The wireless communication site access permit may be canceled upon written notice for reasons specified in the wireless communication site access permit general provisions. The permit will only be issued if it meets all state criteria, including, but not limited to, design and safety standards.

Only one wireless communication site access user per permit shall be allowed, but more than one permit may be issued for a single Type F approach.

Each permitted access user shall be required to pay to the state five hundred dollars annually in compensation for use of the state-owned access rights, at the time of the issuance of the permit and each year thereafter.

Since the state is the owner of the access, Type F approach permits shall not be issued pursuant to chapter 47.50 RCW and shall not confer a property right upon the permittee(s). An applicant for a Type F approach permit shall pay a nonrefundable access application fee when

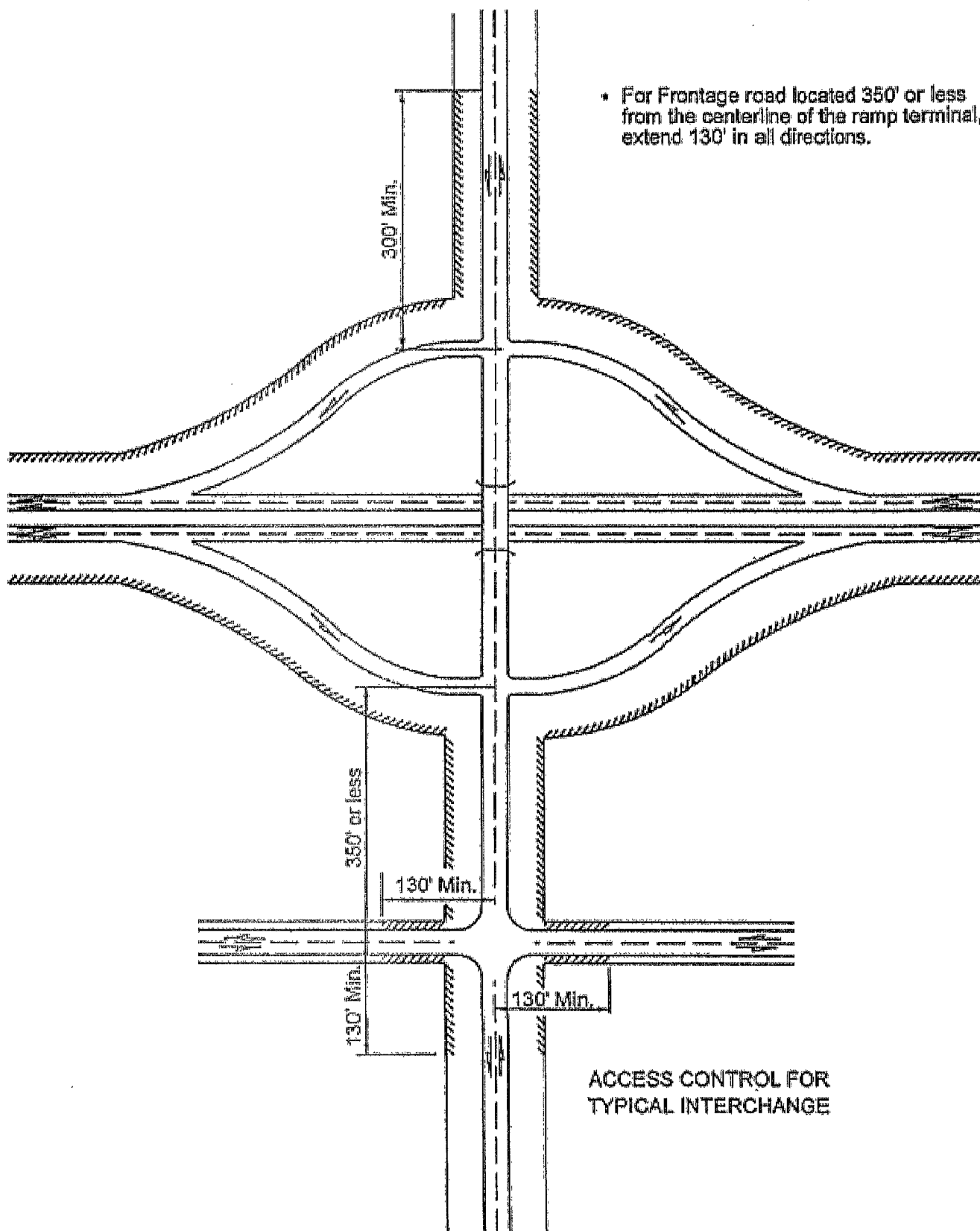
application is made in the amount of five hundred dollars for investigating, handling and granting the permit.

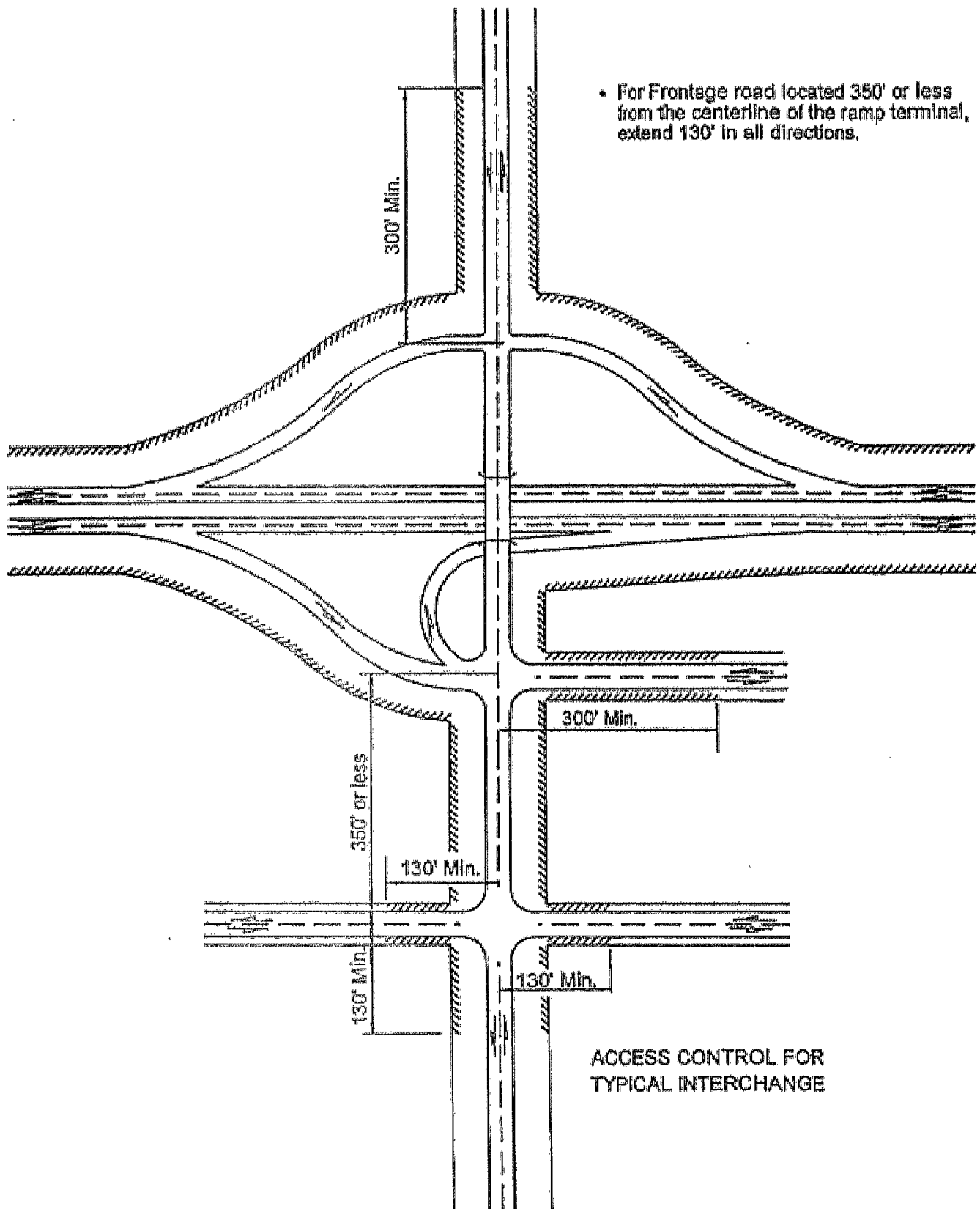
An application for wireless communication site access permit shall receive a response from the department of transportation within thirty working days from date of receipt of said application.

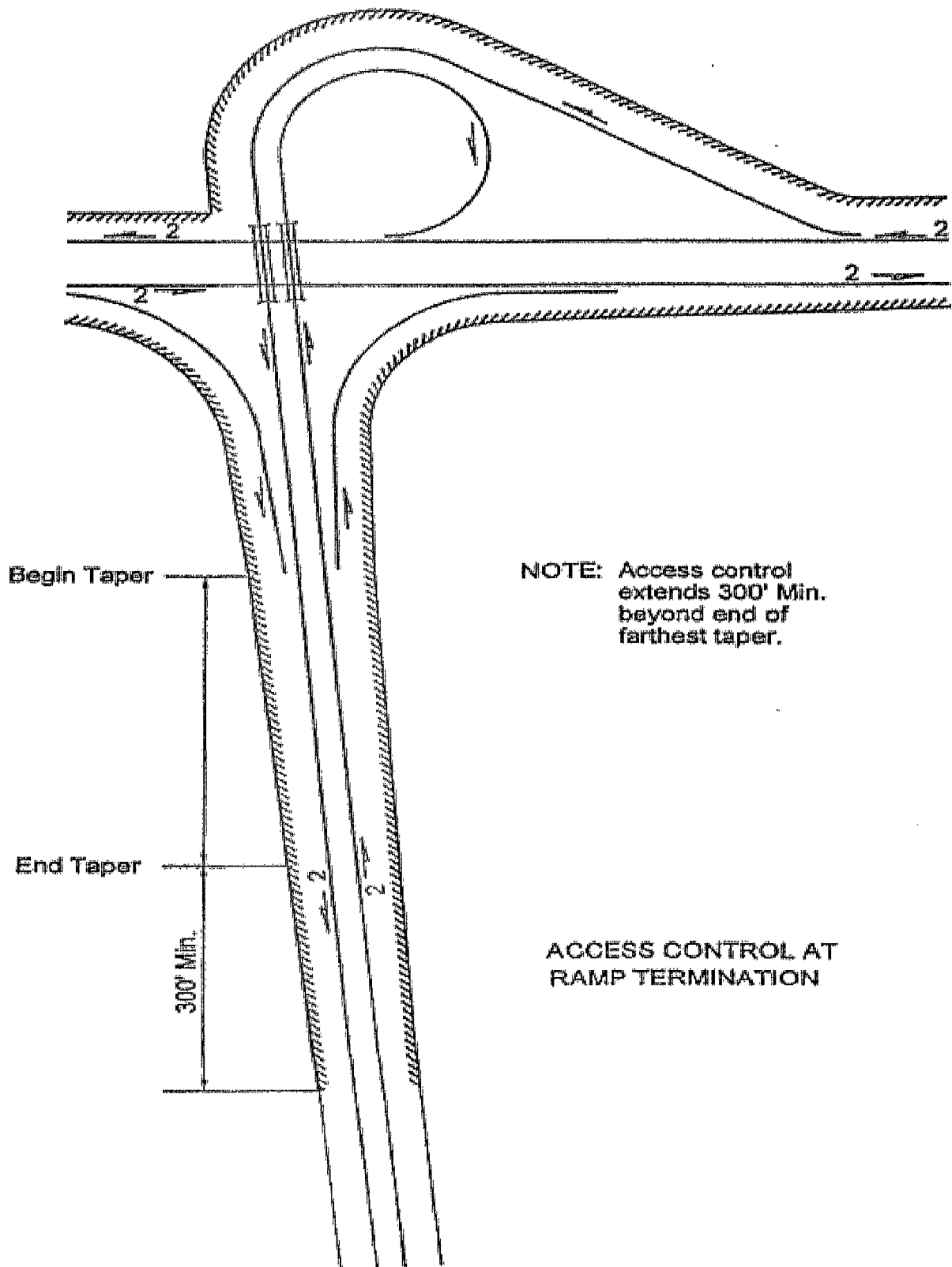
(c) Under no circumstances will a change in location or width of an approach be permitted unless approved by the secretary. Noncompliance or violation of these conditions will result in the immediate closure of the approach.

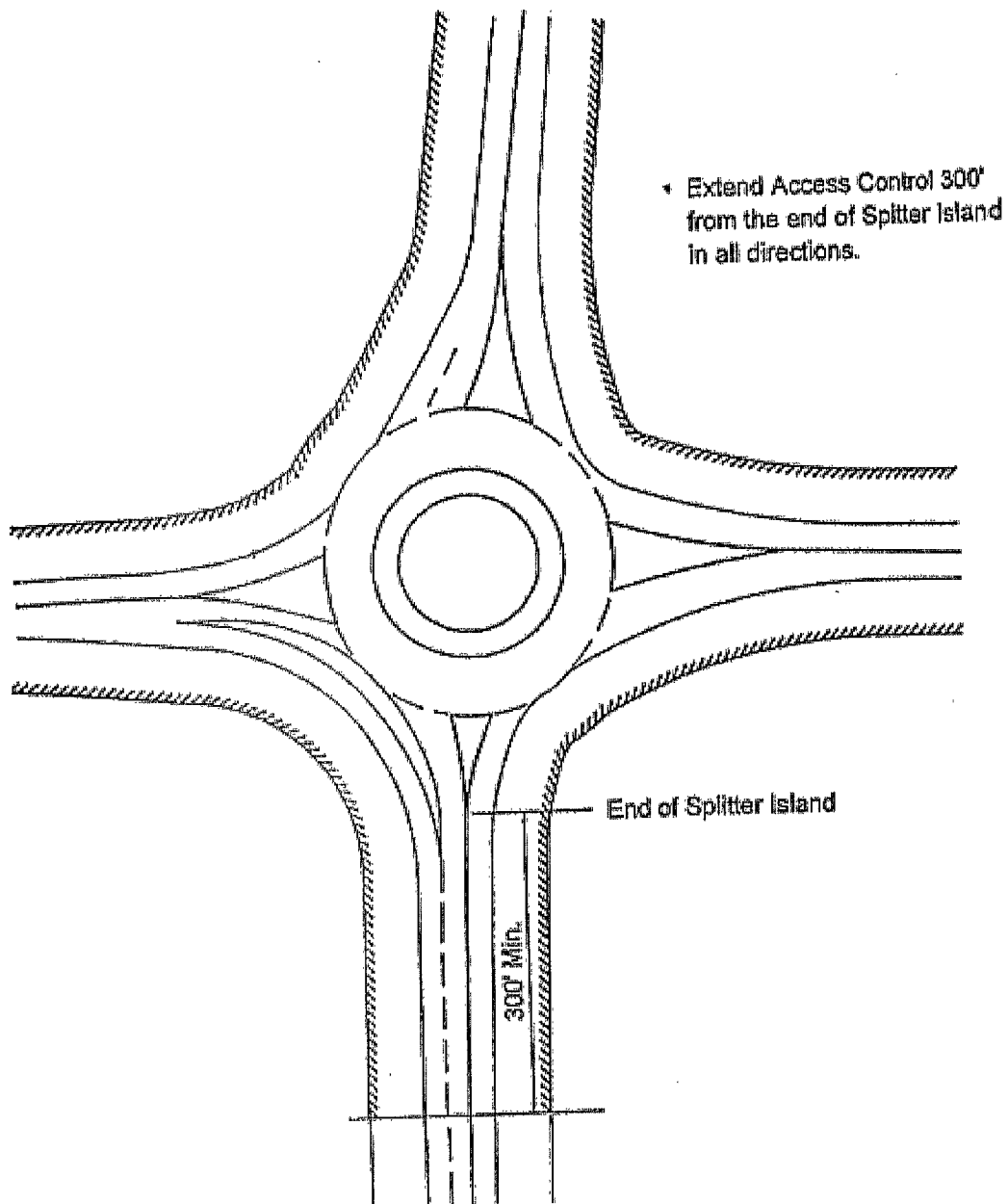
(d) Commercial approaches shall not be permitted within the limits of access control except where modified access control has been approved by the department.

(e) All access control shall be measured from the centerline of the ramps, crossroads or parallel roads or from the terminus of transition tapers. On multiple lane facilities measurement shall be from the centerline of the nearest directional roadway.

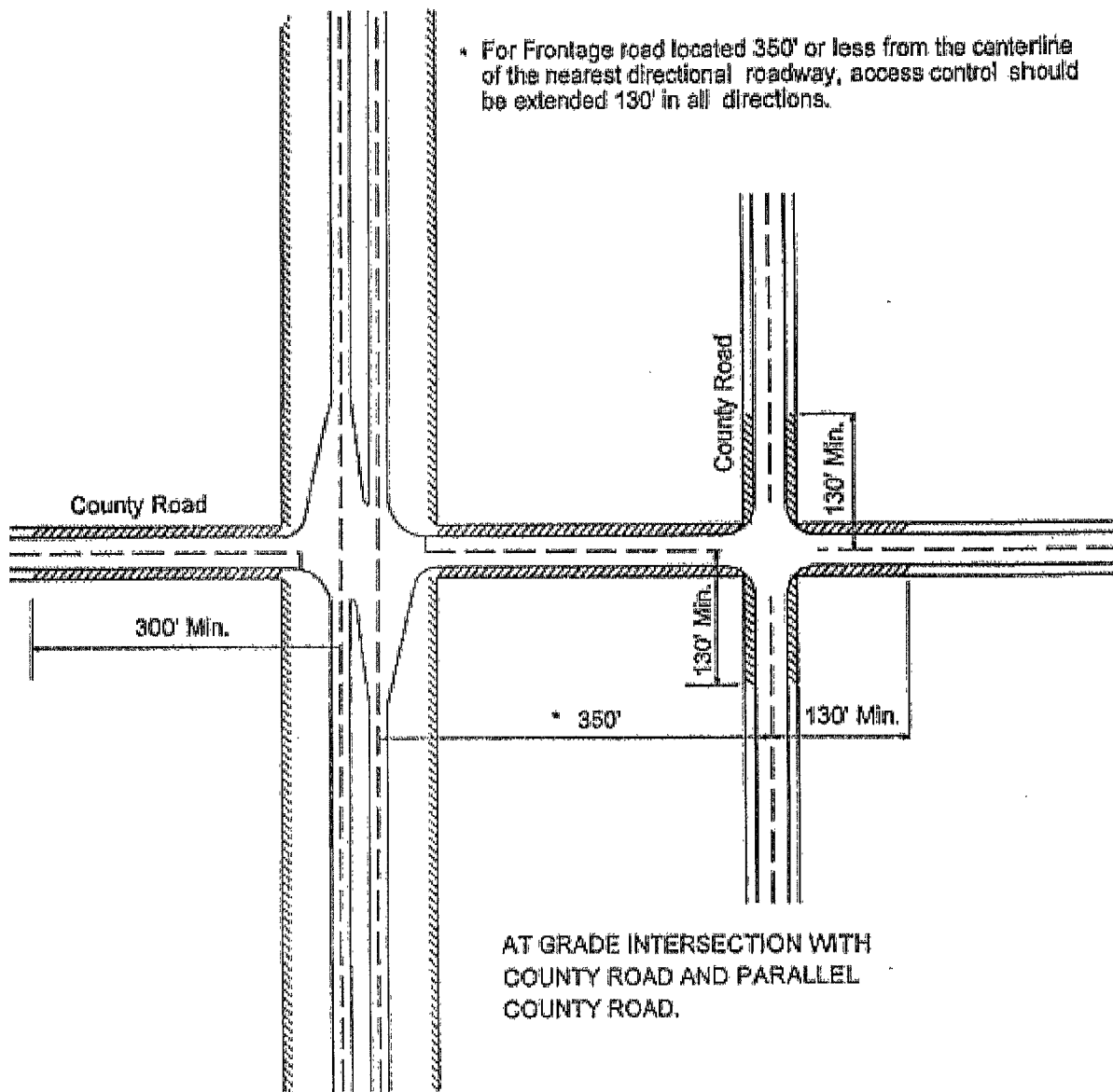




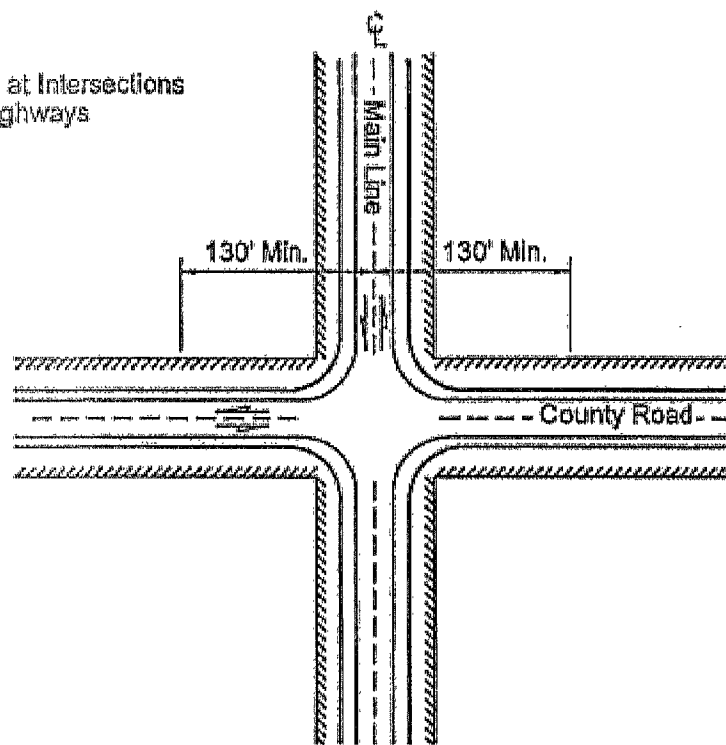




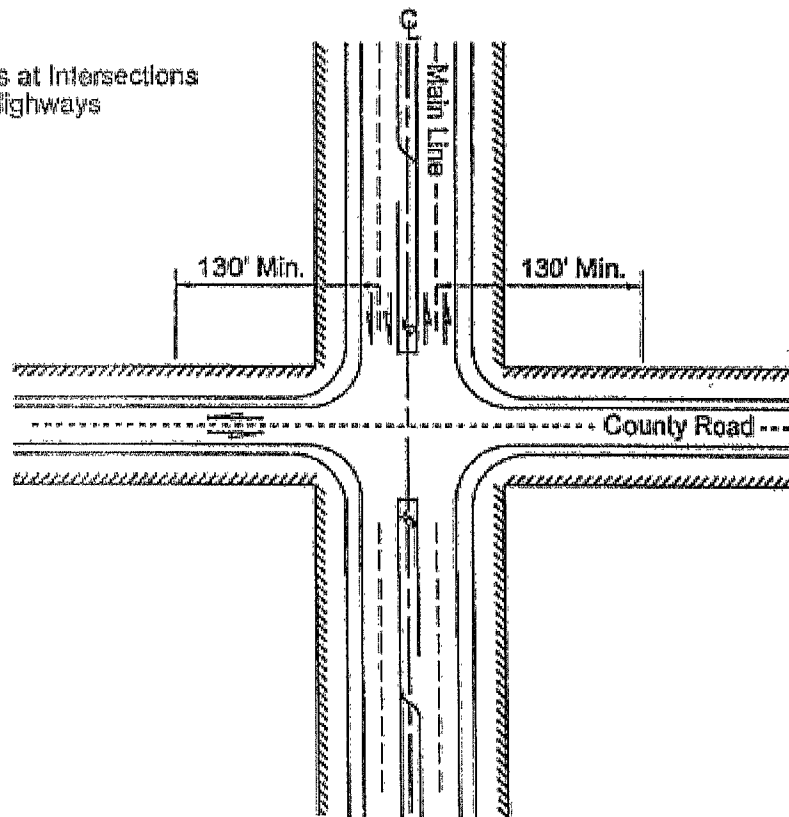
ACCESS CONTROL FOR TYPICAL ROUNDABOUT



Access Control Limits at Intersections
Modified Control Highways
Two-Lane



Access Control Limits at Intersections
Modified Control Highways
Multi-Lane



ACCESS CONTROL LIMITS AT INTERSECTIONS

[Statutory Authority: RCW 47.52.027. WSR 03-11-076, § 468-58-080, filed 5/20/03, effective 6/20/03. Statutory Authority: RCW 47.01.101(5). WSR 87-15-021 (Order 109), § 468-58-080, filed 7/8/87. Statutory Authority: RCW 47.52.020. WSR 79-08-061 (Order 34), § 468-58-080, filed 7/23/79. Statutory Authority: 1977 ex.s. c 151. WSR 79-01-033 (DOT Order 10 and Comm. Order 1, Resolution No. 13), § 468-58-080, filed 12/20/78. Formerly WAC 252-20-051.]

WAC 468-58-100

Guides for the application of modified access control on existing state highways.

(1) Definitive standards for road approaches on modified access controlled highways shall be as follows:

(a) The type of approach for each parcel shall be commensurate with the present and potential land use and be based on appraisals which consider the following:

- (i) Local comprehensive plans, zoning and land use ordinances.
- (ii) Property covenants and/or agreements.
- (iii) City or county ordinances.
- (iv) The highest and best use of the property.
- (v) Highest use and best use of adjoining lands.
- (vi) Change in use by merger of adjoining ownerships.
- (vii) All other factors bearing upon proper land use of the parcel.

(b) The type of approaches* to be considered are:

- (i) Type A (residential).
- (ii) Type B (farm).
- (iii) Type C (special use).
- (iv) Type D (commercial single 50 feet width).
- (v) Type E (commercial double 30 feet width).

(c) Once established, the type, size and location of the approach may be modified by the secretary of transportation or his designee.

(d) When Type D or E approaches have been established, interim use of Type A or B approaches will be allowed.

(2) Design. The number and location of approaches on a modified access control highway shall be carefully planned to provide a safe highway compatible with present and potential land use. The following will be applied:

(a) Parcels which have access to another public road or street as well as frontage on the highway will not normally be allowed direct access to the highway.

(b) Approaches located in areas where sight limitations create undue hazard shall be relocated or closed.

(c) The number of access openings shall be held to a minimum. Access openings are limited to one approach for each parcel of land with the exception of extensive frontages where one approach is unreasonable or for Type E approaches which feature separate off and on approaches.

(d) Joint use of access approaches shall be considered, where feasible.

(e) New approaches will be considered at the time of plan adoption to prevent a physical "landlock" by reason of access taking.

(f) Existing access points not meeting the test of these rules as described in this section, will be closed.

*Refer to WAC 468-58-080 for definitions.

[Statutory Authority: RCW 47.52.020. WSR 79-08-061 (Order 34), § 468-58-100, filed 7/23/79.

Statutory Authority: 1977 ex.s. c 151. WSR 79-01-033 (DOT Order 10 and Comm. Order 1, Resolution No. 13), § 468-58-100, filed 12/20/78. Formerly WAC 252-20-090.]

ERIKSON & ASSOCIATES LAW

February 10, 2016 - 4:16 PM

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Court of Appeals Case Number: 48074-3

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